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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 451

ALEJANDRO D. LLANOS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
AND
BRIEF IN SUPPORT THEREOF.

HYMAN M. GREENSTEIN,
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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Alejandro D. Llanos, Mrs. Salome V. Llanos, Honofre A. Andrada, Antonio L. Bacilio, Dionicio Flores, Aquilino S. Galiza, and Rogilio Oducayen, petition

that a writ of certiorari issue to review a judgment entered against them on September 4, 1953 by the United States Court of Appeals for the Ninth Circuit, in a cause pending in that Court, numbered and entitled, "No. 13,479, *Alejandro D. Llanos, et al., Appellants, v. United States of America, Appellee.*"

The said judgment affirms a judgment of conviction and sentence of 5 years and five days imprisonment and $10,000 fine imposed upon petitioner Alejandro D. Llanos, with lesser terms and fines imposed upon the other petitioners, on October 10, 1951, by the United States District Court for the District of Hawaii, the Honorable Delbert E. Metzger, presiding.

Said judgment and convictions were for alleged violations of the Securities Act of 1933, the Mail Fraud Act and the Conspiracy section of the Criminal Code.

THE INDICTMENT, ETC.

On April 2, 1951, an indictment was returned in the United States District Court for the District of Hawaii (Criminal No. 10,426) charging petitioners (and two others, since discharged and not parties to this appeal) with violations of the laws of the United States, to wit:

13 Counts of violation of Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. 77 q(a)(1);

6 Counts of violation of Section 215 of the Criminal Code, the Mail Fraud Act, 18 U.S.C. 1341; and

1 Count, with 9 overt acts of violation of the Criminal Code, the Conspiracy section, 18 U.S.C. 371. (R. 3-30.)

Simply stated, the indictment charges petitioners with devising a fraudulent scheme to defraud persons in the investment of securities; in the use of fraudulent representations to induce the investment in said securities; and in the use of the mails and communications in execution thereof.

Following trial, jury waived, petitioners were found guilty of 17 of the 20 counts.

Petitioners thereupon filed a motion in arrest of judgment contending in the main that none of the instruments admitted into evidence constituted "securities" within the meaning and prohibition of the Securities Act of 1933. (R. 38.) This motion was denied and the petitioners sentenced to various terms of imprisonment and fines. With the exception of Mrs. Llanos, all petitioners are presently in custody.

Appeal was duly perfected and taken to the United States Court of Appeals for the Ninth Circuit, which overruled the contentions of petitioners and affirmed the judgment of the Court below.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

(a) Preliminary facts.

Alejandro D. Llanos and other petitioners were engaged in borrowing various sums of money from the Filipino community in Hawaii for various purposes.

In connection with the sums borrowed various types of receipts or notes were given the persons who loaned moneys. Witnesses who were called at the trial testified that they loaned the moneys on a "fixed" volley-ball game; or for such reasons as personal loans; tailoring bill; to help Llanos pay his taxes; to help Llanos pay his lawyer; for medical bills of Llanos; for travelling expenses of Llanos and his party; or simply because they were friends of Llanos or others.

With the exception of those loans made on "fixed" games which we contend do not come within the purview of the Securities Act, none of the witnesses testified that he or she were investing in anything or buying anything.

(b) Evidence as to dealing in securities.

During the course of the trial the government, over objection introduced into evidence numerous exhibits as "securities."

Three stacks of notes (being Government Exhibits Nos. 61, 62 and 63) totalling 1112 notes were admitted into evidence over objection of petitioners even though there was no evidence that any of the notes had been delivered to anyone and though there was no

evidence tying up any of these notes to any persons loaning moneys or investing in anything.

Other notes or acknowledgements of indebtedness were admitted into evidence without any affirmative evidence that the moneys represented thereby had been loaned as a result of any misrepresentation, fraudulent or otherwise.

JURISDICTIONAL STATEMENT.

The Supreme Court has jurisdiction to review the judgment under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

This appeal presents the following questions for consideration:

1. Is any note or receipt, regardless of form or maturity date, a "security" within the meaning and prohibition of the Securities Act of 1933?

2. Assuming a scheme to defraud, does proof of making loans for an immediate lawful purpose constitute proof of a violation of the Securities Act of 1933?

3. Do loans made and notes given in exchange therefor, for the express purpose of betting on a "fixed" volleyball game, come within the purview of the Securities Act of 1933?

4. Can notes be properly admitted in evidence where they are not tied up to any persons loaning any money in a prosecution for selling and dealing in securities in pursuance to a scheme to defraud?

5. Assuming that the "investing" of moneys on a "fixed" sporting event does not come within the purview of the Securities Act of 1933, can a conviction for devising a scheme to defraud, making fraudulent representations, and inducing persons to invest and purchase securities in pursuance of said scheme and using the mails in connection therewith be sustained, without a single bit of evidence that any person was investing in anything or buying anything?

6. Assuming that the "investing" of moneys on a "fixed" sporting event does not come within the purview of the Securities Act of 1933, can a conviction for devising a scheme to defraud, making fraudulent representations, and inducing persons to invest and purchase securities in pursuance of said scheme and using the mails in connection therewith be sustained, without a scintilla of evidence that any of the representations were employed in furtherance of said scheme?

WHY THE WRIT SHOULD BE GRANTED.

This appeal fairly poses the question as to what type of instrument constitutes a "security" within the meaning and prohibition of the Securities Act of 1933.

Is any note or receipt a "security"? Or must the instrument be one that is generally known to be a "security" as the term is understood in the investment world?

Do persons who put up money on a "fixed" volley ball game and get notes or receipts therefor come within the umbrella of protection of the Securities Act of 1933? Are such transactions dealing in the "sale of securities" within the meaning and prohibition of the Securities Act of 1933?

These are important questions of federal criminal law which have not been, but which should be, interpreted and adjudicated by this Honorable Court.

Moreover, the punishment in this case is more serious than first appears. Most of the petitioners are aliens and subject to deportation.

PRAYER FOR ISSUANCE OF THE WRIT.

Wherefore, petitioners pray that this Court issue its writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court on a day certain, to be therein designated a full and complete transcript of the record and proceedings of the cause numbered and entitled in said Court "No. 13,479, Alejandro D. Llanos, et al., Appellants v. United States of America, Appellee," to the end that said cause may be reviewed by this Court as provided by

law, that said judgment of said Court of Appeals be reversed and that your petitioners have such other and further relief in the premises as may seem just.

Dated, Honolulu, Hawaii,
October 28, 1953.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioners in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Honolulu, Hawaii,
October 28, 1953.

HYMAN M. GREENSTEIN,
Attorney for Petitioners.

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OCTOBER TERM, 1953

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW.

The judgment of the trial Court was rendered and filed on October 10, 1951. (R. 42-55.)

The decision of the Court of Appeals was rendered and filed on September 4, 1953. (R. 1331.)

The judgment of the Court of Appeals was entered on September 4, 1953. (R. 1338.)

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

The basis on which it is contended this Court has jurisdiction is that an important rule of federal criminal law is involved. Two sections of federal statutes should receive interpretation by this Court. What constitutes a "sale of securities", and just what the term "security" means are important questions of federal criminal jurisprudence which have not, but should, be interpreted by this Court.

STATUTES INVOLVED.

15 U.S.C. 77q(a)(1), upon which the first 13 counts were based, reads as follows:

> "Sec. 77q. Fraudulent interstate transactions.
>
> (a) It shall be unlawful for any person *in the sale of securities* by the use of any means or instruments of transportation or communication in interstate commerce, or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme or artifice to defraud." (Italics added.)

The term security is defined in Section 77b of Title 15 U.S.C. as follows:

> "Sec. 77b. Definitions.
>
> (1) The term 'security' means any note, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any

profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, *or, in general, any interest or instrument commonly known as a 'security'*, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, warrant or right to subscribe to or purchase, any of the foregoing." (Italics added.)

STATEMENT OF THE CASE.

Petitioners were convicted on 12 counts of violating Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. 77q(a)(1); 5 counts of mail fraud, 18 U.S.C. 1341; and on one count of conspiring to commit the foregoing crimes, 18 U.S.C. 371.

The indictment alleges a scheme whereby petitioners would obtain money for their own use by making various false representations. Among the false representations alleged were the following: that the money would be bet on a "fixed" volleyball game; that a company they represented had over $6,500,000 in a bank; and that certain of the petitioners were officers in a large shipping company.

Petitioners contend that persons who put up money to be bet on a "fixed" sporting event do not come within the protection or purview of the Securities Act of 1933; and that while the petitioners may have been

guilty of some crime or crimes for engaging in this activity, it was not the crime charged, to-wit: violation of the *Securities Act.*

Your petitioners further contend that not one person testified that he or she loaned any money on the basis of any of the representations charged in the indictment and that each loan testified to in evidence was for an immediate legal purpose (except in the instances of the betting on "fixed" games).

It is also contended that petitioners were not engaged in the "sale of securities" within the meaning and prohibition of the Securities Act of 1933.

SPECIFICATION OF ERRORS RELIED UPON.

1. The opinion of the Court of Appeals is in error in holding that the instruments admitted into evidence in the District Court constituted "securities" within the meaning of the Securities Act of 1933.

2. The opinion of the Court of Appeals is in error in holding that soliciting moneys to bet on "fixed" sporting events and giving notes or receipts therefor comes within the purview or prohibition of the Securities Act of 1933.

3. The opinion of the Court of Appeals is in error in holding that the evidence supports the finding that petitioners were engaged in the "sale" of securities.

4. The opinion of the Court of Appeals is in error in holding in effect that the evidence supports the find-

ing that any person or persons loaned or invested moneys on the basis of any of the false representations alleged (with the exception of the transactions as to "fixed" games which we contend do not come within the purview of the Act).

5. The opinion of the Court of Appeals is in error in sustaining the trial Court's rulings on the admissibility of the documentary evidence.

ARGUMENT.

I. THE INSTRUMENTS ADMITTED INTO EVIDENCE DO NOT CONSTITUTE "SECURITIES" WITHIN THE MEANING OF THE SECURITIES ACT OF 1933.

It is the position of your petitioners that none of the hybrid notes, receipts, investment contracts (so-called), mutual agreements, evidences of indebtedness, or other instruments, described in the indictment and received in evidence as any of the government exhibits, ranging from No. 1 to No. 66 inclusive, were "securities", as that term is defined in Section 2(1) of the Securities Act of 1933, Title 15 U.S.C. Section 77b(1).

To give any legalistic, or even common sense to Section 77b(1) Title 15 U.S.C., it is essential that the enumerated classes of instruments therein listed be read with the qualifying phrase as applicable to each thereof, "* * * *or in general, any interest or instrument commonly known as a 'security'* * * *"

With respect to the term "note", it should be observed that there are several definitions of "note" in words and phrases. Are they all to be construed as "securities" under the definition of 15 U.S.C., Section 77b?

Regardless as to the inclusion of "note" within the definition of a "security"—there is no Supreme Court case decided under the Securities Act of 1933 judicially holding that a note—a promissory note—whether negotiable or not—is a "security". On the other hand, we do have numerous decisions of the Courts of the United States and of the several states, holding that a short term note is not a "security."

See:

Courtland Specialty Co. v. Commissioner of Internal Revenue (2d Cir.), 60 F. (2d) 937;

Cecil B. De Mille Prod'ns v. Woolery (9th Cir.) 61 F. (2d) 45 (1932);

Lloyd-Smith v. Commissioner, 116 F. (2d) 642, 643 (1941);

Pinellas Ice & C. Co. v. Commissioner, 287 U.S. 462, 468, 77 L.ed. 428, 432.

In *L. & E. Stirn v. Commissioner* (2d Cir.), 107 F. (2d) 390 (1939) the Court held that short term notes, and even short term bonds, were not securities:

> "* * * The question is always whether bonds or notes which are exchanged represent an investment in the business of the transferee or are a practical substitute for a cash sale, as were the short term notes in Pinellas Ice & Cold Storage Co. v. Commissioner, 287 U.S. 462, 77 L.ed. 428,

the longest of which became due in four months, or the notes running from one to fourteen months in Courtland Specialty Co. v. Commissioner, 60 F. 2d 937, or the five year bonds in Worcester Salt Co. v. Commissioner, 75 F. 2d 251.

"In the case at bar the bonds not only had an average maturity of only two and one-half years but were all paid off within ten months. In our opinion they did not furnish a *continuity of interest* in the Concordia-Ballia Corporation sufficient to bring them within the meaning of *'securities' as that word has been construed in the United States Courts* * * *"

In a case, decided March 26, 1946, the 9th Circuit Court of Appeals held that an unsecured demand note was not a security under the Bankruptcy Act, the Court saying:

"* * * No case is cited holding that demand notes are securities within the meaning of Section 112(b) or similar provisions of earlier acts. We are of the view that the Tax Court was clearly correct in holding that the unsecured demand note which taxpayer exchanged in 1935 for the stock sold in 1940 was not a security within the meaning of Section 112(b)(3) or Section 112(1), supra, and accordingly did not carry over and become the basis of the stock * * *"

Pacific Public Service Co. v. Commissioner (9th Cir.) 154 F. (2d) 713, 714.

While we respect the significance and implications of the definition in the Securities Act of 1933 that the term "security" includes "note," yet, because of

the paucity or lack of interpretive decisions, holding a note to be a security under 77b or 77a of Title 15, U.S.C., we pose the question as to whether it was the intent of Congress to make every promissory note, regardless as to amount or term, given by one individual to another, a security, subject to all the regulatory and prohibitory provisions of the Securities Act of 1933.

In the matter of statutory construction of Section 77b, we focus attention on the words,

> "* * *, or, in general, any interest or instrument commonly known as a security, * * *"

and urge that these are words of limitation, restricting the general meaning of the word "note" in said section to such notes which at the time of the enactment of the Securities Act on May 27, 1933, were "commonly known as securities."

Sound and reliable authorities on statutory construction and interpretation support our contention. In *American Jurisprudence* we find the general rule succinctly set forth:

> "Thus, where several words in a statute are followed by a general expression or clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the expression or clause be read as applicable to all * * *"
>
> 50 *Am. Jur.*, 258, § 269.

Can it be seriously contended that it was the legislative intent of the Congress of the United States in

enacting the Securities Act on May 27, 1933, to elevate to the dignity of a "security" an ordinary short-term promissory note, not involving a general offering to the public—but the every day note with which a man may pay a debt?

With respect to "evidence of indebtedness," which also falls within the definition of "security" in 15 U.S.C. §77b, we submit that an "I.O.U." or the common-place chit which a man may sign at the country club or at his restaurant is an evidence of indebtedness. As can be clearly seen, the logical follow-up of the literal meaning of the language in §77b(1) of Title 15 U.S.C., will result in a gross absurdity unless the qualifying clause therein contained—"* * *, or, in general, any interest or instrument commonly known as security,"—is made applicable to "note", "evidence of indebtedness," "investment contracts," and the other instruments mentioned in said section 77b(1).

It should be quite manifest that if we construe a "note" or "evidence of indebtedness"—as being a security, without further qualification, we are developing a situation where a simple "I.O.U." or signed meal ticket would consistently and logically fall within the definition of "security". Obviously, that was not the intent of the 73d Congress.

> "If we assume—as we must—that the lawmakers are conscientious, in event the statute is ambiguous and subject to several constructions, that one which operates in a harsh, unreasonable or absurd manner certainly does not represent the

legislative intent. The basic and underlying purpose of all legislation, at least in theory, is to promote justice. Because it must be presumed that the legislature has acted for the welfare of the people, the presumption that its enactments were not intended to operate other than for the best interest of the people is well founded.

As a result, the court should strive to avoid a construction which will tend to make the statute unjust, oppressive, unreasonable, absurd, mischievous, or contrary to the public interests."

Crawford on Statutory Construction, p. 288, §177 (in part).

It should be most clear in the instant case that to construe the terms "note" and "evidence of indebtedness," in their unqualified literal meaning, without the general qualifying clause "* * *, or, in general, any interest or instrument commonly known as a security * * *" would, in effect, impute to the 73d Congress the intent to effect an absurdity.

Legislative history of Securities Act.

To properly evaluate the object, purpose and intent, we may well look to the legislative history of the act,—the executive's message, committee reports, etc.

"In construing ambiguous statutes, courts have referred to messages of the executive to the legislature relative to the subject considered in the statute in litigation in order to ascertain the evils at which the statute was aimed * * *"

Sutherland on Statutory Construction, 3d ed., Vol. 2, p. 487, §5004.

When Franklin Delano Roosevelt was sworn in as President of the United States on March 4, 1933, the depression was at its worst—the unemployed numbered millions,—banks and businesses were crashing on every side. Stern corrective measures were needed, —probably more so than in wartime,—to save this Nation from economic ruin. The stock panic of October-November, 1929, brought about in great measure by the unscrupulous manipulations of wild-cat investment and the finance companies, precipitated a three-year depression and the country had learned its lesson.

At the instance of President Roosevelt, the Securities Act was drafted by the Honorable Samuel Untermyer of New York and forwarded to Congress with the following message, on March 29, 1933:

> "I recommend to the Congress legislation for Federal supervision of traffic in investment securities in interstate commerce.
>
> "In spite of many State statutes the public in the past has sustained severe losses through practices neither ethical nor honest on the part of many persons and corporations selling securities.
>
> "Of course, the Federal Government cannot and should not take any action which might be construed as approving or guaranteeing that newly issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit.
>
> "There is, however, an obligation on us that every issue of new securities to be sold in inter-

state commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.

"This proposal adds to the ancient rule of caveat emptor the further doctrine—'let the seller also beware.' It puts the burden of telling the whole truth on the seller. It should give impetus in honest dealing in securities and thereby bring back public confidence.

"What we seek is a return to a clearer understanding of the ancient truth that those who manage banks, corporations and other agencies handling or using other people's money are trustees acting for others.

"Franklin D. Roosevelt."

Here, we have the fundamental object of this legislation,—to protect the national economy and the investing public against the surreptitious and fraudulent machinations of irresponsible investment and banking enterprises. Certainly, it was not intended to hinder, hamper or regulate the individual debtor-creditor relationship or borrower-lender dealings,—not involving the public at large,—all of which are traditionally everyday occurrences.

"The Report of the standing committee in each house of the legislature which investigated the desirability of the statute under consideration is a much used source for determining the intent of the legislature, when it sets forth the committee's grounds for recommending passage of the proposed bill and, more important, its under-

standing of the nature and effect of the measure * * *"

Sutherland on Statutory Construction, Vol. 2, p. 489, § 5005.

After hearings on the proposed measure, on May 4, 1933, Congressman Sam Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce, reported the measure (H.R. 5480), out of committee, accompanied by House Report No. 85, in which appear the following significant passages:

"The background of the President's message is only too familiar to everyone. During the post-war decade some 50 billions of new securities were floated in the United States. Fully one-half or $25,000,000,000 worth of securities floated during this period have been proved to be worthless * * *

"High-pressure salesmanship rather than careful counsel was the rule in this most dangerous of enterprises.

"Equally significant with these countless individual tragedies is the wastage that this irresponsible selling of securities has caused to the industry * * *

"Whatever may be the full catalogue of the forces that brought to pass the present depression, not least among these has been this wanton misdirection of the capital resources of the Nation* * *"

From the President's message and the report of the Chairman of the Committee on Interstate and Foreign

Commerce, it is quite evident that the purpose and intent of the 73d Congress in enacting the Securities Act of 1933 encompassed banks, corporations and other agencies, dealing in instruments which were then known as securities and that there is no justification for the extension of the scope of this enactment to "short-term notes", "evidences of indebtedness", and other instruments which at that time of enactment of the Securities Act of 1933 were not commonly known as "securities".

It should be kept in mind that all the notes admitted into evidence were short-term notes payable in not more than 90 days.

Add to this the fact that none of the witnesses testified that they were investing in securities and it is hard to rationalize the holdings of the lower Courts that we are dealing with "securities" in this case.

II. NOTES GIVEN IN EXCHANGE FOR MONEY TO BE BET ON "FIXED" SPORTING EVENTS DO NOT COME WITHIN THE PURVIEW OF THE SECURITIES ACT OF 1933.

It is not our purpose to make an extended argument under this point.

To say that a person loaning money to be bet on a fixed game and getting a note therefor is entitled to the protection of the Securities Act of 1933 is to extend the protection of that Act far beyond the intent of the Congress. The Act was designed to pro-

tect the investing public—not the gambling elements of our community.

> "The Court. Why do you say you loaned Llanos $1,200?
>
> The Witness. Because they told me that the volley ball game will be played by Llanos and if they won, if Llanos will win the game, why they will give me triple the amount which I loaned them." (R. 167.)

The mere citing of the type transaction involved would, it seems, answer the question as to whether we have a "securities act" violation here. The act cannot apply to all situations—and it certainly was not the intent of the Congress to lend protection to "investors" of this type.

III. THERE IS ABSOLUTELY NO EVIDENCE THAT PETITIONERS WERE ENGAGED IN THE SALE OF SECURITIES.

It is respectfully submitted that throughout the length and breadth of the trial, there is not the slightest bit of evidence that petitioners were engaged in dealing with securities in the sense that they were selling, offering or soliciting the sale of securities as charged in the indictment.

Yes, the evidence does establish that petitioners did borrow money from several persons and promised in turn to repay them.

But none of the witnesses, who, at the time of the trial testified that they had loaned money to Llanos,

said they were investing in anything or buying anything. In none of these cases were petitioners selling any securities. They were simply borrowing money.

Acojido testified that he made a loan to Llanos because Llanos was sick and needed the money. (R. 384.)

Joe Antenorcruz testified that Llanos paid him $3,000 for some tailored suits, which sum he loaned back to Llanos to pay taxes, receiving, later, a note for its repayment; that at the time he loaned the money to Llanos it was not an investment. (R. 489-520.)

The Philippine Farming Corporation loaned money to Llanos to help defray expenses of a trip (R. 93) and because they believed he would invest moneys in their company (R. 115). Is this a sale of securities, simply because a note or evidence of indebtedness was given the lender?

Yapit loaned money to be placed on a fixed volleyball game to get a triple return of his money. (R. 167.) Antipala put up money likewise to be bet on the game. (R. 205.) So did Trinidad (R. 280), Rabaino (R. 399), and Acosta (R. 568).

Others loaned the money for reasons of personal friendship or because they wanted to help out Llanos. (R. 245, 361, 362, 379, 392-3.)

"Q. Why did you loan them this money?

A. They told me that they need money to pay the tax in the Philippines.

Q. Did you think you were investing your money?

A. No.

Q. It was just a personal loan, was it not?

A. Yes.

Q. They didn't try to get you to buy any promissory note, did they?

A. No.

Q. So actually, you loaned them this money in order to help out didn't you?

A. Yes.

* * * * * * *

Q. So actually you loaned this money because Mr. Llanos was sick, did you not?

A. Yes."

(From the cross-examination of the witness Acojido by Mr. Greenstein, R. 392-393.)

ARE THESE DEALINGS IN, OR SALES OF SECURITIES? No!

Where, in the language of the indictment, is there any showing, or evidence, or proof of any purchase or investment and reinvestment of securities?

Where, in the language of the Securities Act of 1933, is there any showing, or evidence, or proof, of any sale or offer to sell any securities?

Where in the language of the first 13 counts of the indictment is there any conduct that constitutes "in the sale of securities"?

It is respectfully submitted that NOT ONLY IS THE EVIDENCE *INSUFFICIENT TO ESTABLISH ANY SALE OR DEALING* IN SECURITIES, *THERE IS ABSOLUTELY NO EVIDENCE WHATSOEVER THAT APPELLANTS*

WERE DEALING IN OR SELLING SECURITIES.

The district judge, in his findings of fact (R. 34-35), found as a fact that the instruments employed by appellants constituted securities as defined by the Securities Act of 1933; and that the conduct of appellants constituted a sale of those securities.

We respectfully urge for this Court's consideration that such findings by the trial judge, and affirmed by the Court of Appeals are clearly erroneous, unsupported by the law, and not supported by any evidence whatsoever.

IV. THERE IS NO EVIDENCE IN THE RECORD THAT ANY PERSON OR PERSONS INVESTED MONEY ON THE BASIS OF THE FALSE REPRESENTATIONS ALLEGED IN THE INDICTMENT.

We have already indicated, that with the exception of those persons who testified that they were loaning money to be bet on a fixed volleyball game, no person testified at the trial that he or she was buying anything or investing in any enterprise of Llanos or of any of the other petitioners; nor did they testify that they loaned any moneys upon the basis of the representations alleged in the indictment.

It would serve no purpose to outline the testimony of each witness; suffice it to say that with the exception of the investors interested in making a sure bet, all loans were made for an immediate lawful purpose:

either out of friendship for Llanos or other petitioners, or because they wanted to help him out.

We challenge the government to point to one witness who thought he was investing in anything.

For this reason we respectfully urge that there is no evidence in the record to sustain the judgments of conviction herein.

V. THE RULINGS ON THE ADMISSIBILITY OF THE EVIDENCE WERE ERRONEOUS.

A. The Court of Appeals is in error in holding that U. S. Exhibits Nos. 61, 62 and 63 were properly admitted in evidence.

During the course of the trial there was admitted into evidence the following:

U. S. Exhibit No. 61—consisting of 814 "mutual agreement" notes;

U. S. Exhibit No. 62—consisting of 248 promissory notes, payable in 90 days;

U. S. Exhibit No. 63—consisting of 50 promissory notes, payable in 60 days.

Mrs. Taganas, the prosecution's principal witness, testified that she seized these notes in the office of the Philippine Farming Corporation, and turned them over to the Better Business Bureau, who in turn, it is presumed, turned them over to the government. (R. 150-159.) There is absolutely no evidence that the notes were delivered to anyone, nor that any persons invested money on account thereof, nor loaned

any money as purports to be represented thereby. Counsel objected to their admission into evidence on the grounds:

a. That the same do not constitute "securities" within the meaning of the Securities Act of 1933;

b. That there was no evidence that the same were offered for sale or were sold;

c. That there was no evidence that any person referred to therein had invested any money;

d. That there was no evidence that any of the notes actually were delivered to any person or persons. (R. 1126-1131.)

Even if these documents be securities within the Act (which of course they are not) there was *no* evidence tying up these exhibits to any specific persons and hence their admission into evidence was erroneous.

B. The Court of Appeals is in error in holding in effect that the other documentary evidence was properly admitted in evidence.

Throughout the course of the trial, there was admitted into evidence, over objection, various exhibits. These the trial Court ruled to be "securities" within the meaning of the Securities Act of 1933. Without making a further argument on this point, we simply submit that not a single exhibit, of the hundreds of documents admitted into evidence, constitute a "security" within the meaning of the Securities Act of 1933, for the reasons urged above.

CONCLUSION.

1. The Court of Appeals has ruled in effect that any note or receipt or acknowledgment, regardless of form or term, is a security within the meaning of the Securities Act of 1933.

This presents an important question of federal criminal law which should be finally determined by this Court.

2. The Court of Appeals has ruled in effect that convictions in the instant case should be affirmed which are not supported by the evidence. This is such a departure from the accepted and usual course of American judicial proceedings and such a deprivation of our accepted notions of due process of law that this Court should grant a writ of certiorari and a reversal of judgment as prayed for.

Dated, Honolulu, Territory of Hawaii,
October 28, 1953.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Attorney for Petitioners.

(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 13,479 Sep. 4, 1953

Alejandro D. Llanos, Mrs. Salome V. Llanos, Also Known as Mrs. Alejandro D. Llanos, Honofre A. Andrada, Antonio L. Bacilio, Dionicio Flores, Aquilino S. Galiza and Rogilio Oducayen, Also Known as R. T. Oducayen,

Appellants,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the District of Hawaii.

Before: DENMAN, Chief Judge, and MATHES and LEMMON, District Judges.

DENMAN, Chief Judge:

This is a criminal appeal from a judgment of conviction by the United States District Court for the District of Hawaii. Trial was before the court without a jury.

Appellants raise three questions by this appeal: (1) whether the instruments involved were "securi-

ties" within the meaning of the Securities Act of 1933; (2) whether appellants were engaged in the "sale" of securities within the meaning of that Act; and (3) whether the trial court erred in receiving in evidence certain exhibits. A fourth question, concerning the validity of the indictment, was waived on oral argument.

Appellants were convicted on 12 of 13 counts of violating Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. §77a et seq., hereafter the Act; on 5 of 6 counts of mail fraud, 18 U.S.C. §1341; and on one count of conspiring to commit the foregoing crimes, 18 U.S.C. §341. The indictment alleged a scheme whereby the appellants would obtain money for their own use by making various false representations. Among these representations were the following: That the money would be bet on a "fixed" volleyball game; that a company that they represented had over $6,500,000 in the bank; and that certain defendants were officers in and majority stockholders of the Pollock-Stockton Shipbuilding Company.

(A) *The Securities:*

Appellants argue that they were not engaged in the sale of securities within the meaning and prohibition of the Securities Act of 1933 inasmuch as they were directly borrowing from individuals and were giving promissory notes in exchange. In essence, they argue that promissory notes are not securities within the meaning of Section 2(1) of the Act. That section provides in part as follows:

> "The term 'security' means any note * * * evidence of indebtedness, certificate of interest or participation in any profit sharing agreement * * * investment contract * * * or, in general, any interest or instrument commonly known as a security."

Appellants contend that the last clause of the above section, "any interest or instrument commonly known as a security" limits those which come before, and cite many cases which hold that promissory notes were not "securities" under other statutes. Pinellas Ice & C. Co. v. Commissioner, 287 U.S. 462, 468; Courtland Specialty Co. v. Commissioner, 60 F.2d 937 (Cir. 2); Cecil B. DeMille Productions v. Woolery, 61 F.2d 45 (Cir. 9); Union Land Ass'n v. Ussher, 174 Ore. 453. These cases involved the interpretation of the word "securities" as used in particular acts and did not involve the definition of "security" given in the above statute. In defining the word "security" in Section 2(1) of the Act, Congress intended to include all interstate transactions which were the legitimate subject of its regulation and the section should not be construed narrowly. Securities & Exchange Commission v. Joiner Leasing Corporation, 320 U.S. 344, 352; Securities & Exchange Commission v. Crude Oil Corp. of America, 93 F.2d 844, 846 (Cir. 7); Securities & Exchange Commission v. Universal Service Assn., 106 F.2d 232, 237 (Cir. 7), cert. denied, 308 U.S. 622.

The instruments involved, with some immaterial variations, read as follows:

"AGREEMENT

"THIS WILL CERTIFY THAT, I the undesigned ALEJANDRO D. LLANOS, of legal age, married, residing at 1839 Makiki Street, Honolulu T.H., borrowed from..... of.....THE SUM OF..... DOLLARS ($.....) Which I promise to pay on or before (60 or 90) days from today.

"IN WITNESS HEREOF, I set my hand to sign this.....day of....., ...

.....

ALEJANDRO L. LLANOS—borrower

Witness:

....."

This instrument is clearly an "evidence of indebtedness," and as such falls within the statutory definition of securities. United States v. Monjar, 137 F.2d 916, 920 (Cir. 3), cert. denied, 325 U.S. 859.

(B) *Sale of Securities:*

Appellants next argue that even assuming that the instruments were securities and the existence of a fraudulent scheme, the federal court did not have jurisdiction as to counts 1-13 because there is no evidence that the appellants were engaged in the "sale" of securities. The gravamen of their argument is that the giving of a promissory note or an evidence of indebtedness in exchange for a personal loan is not a sale. This contention is untentable. Section 2(3) of the Act, defines "sale" as including "* * * every * * * disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest

in a security for value * * *" The securities were disposed of for value in the transactions involved, and hence the transactions are covered by the broad definition of the statute. Bogy v. United States, 96 F.2d 734, 736 (Cir. 6), cert. denied, 305 U.S. 608.

(C) *Admission of Evidence:*

There were admitted in evidence Government Exhibits No. 61, consisting of 814 mutual agreement notes, No 62, consisting of 248 promissory notes payable in 90 days, and No. 63, consisting of 50 promissory notes payable in 60 days. Appellants claim that, in admitting these exhibits, the trial court erred on the following grounds: (1) that they did not constitute securities; (2) that there was no evidence that they were offered for sale or sold; (3) that there was no evidence that any person referred to therein had invested any money; (4) that there was no evidence that any of them were actually delivered to anybody, and (5) that all the notes represent money given to appellants for an immediate lawful purpose.

The first two grounds relied upon have already been considered and rejected. The remaining grounds are likewise without merit. The crime is devising a scheme and using the mails or methods of transportation or communication in interstate commerce to execute or attempt to execute the scheme. Whether the scheme is successful is irrelevant, as is the purpose for which the dupes may have surrendered their money. Bobbroff v. United States, 202 F.2d 389 (Cir. 9). These exhibits were not introduced to show the

success or failure of the scheme but as tending to show its scope and extent. For this purpose they were properly admitted. Suetter v. United States, 140 F.2d 103 (Cir. 9); Greenbaum v. United States, 80 F.2d 113 (Cir. 9).

The judgment of the district court is affirmed.

(Endorsed:) Opinion. Filed Sep. 4, 1953. Paul P. O'Brien, Clerk.

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